In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 737

BLOOMFIELD STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is an American steamship company which in 1958 and 1959 carried 48 parcels of bulk grain financed by the International Cooperation Administration ("ICA") between ports in the United States and ports in Northern Europe. The written agreements ("booking notes") between the parties incorporated applicable ICA regulations, which included a provision (22 C.F.R. (1958 rev.) 201.7(b)) that the rate charged should not exceed that paid "for similar ocean transportation service by other customers similarly situated" (R. 57). Payments for shipment were made from government funds upon receipt of an invoice to which a "Supplier's Certificate" was attached. The certificate stated (R. 65–66):

> * * * the rate indicated on the reverse of this form for the service rendered does not exceed

> the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated.

The rates charged ICA were, in fact, approximately $270,000 more than those which would have been charged by petitioner to commercial shippers for the same shipments.[1] Petitioner instituted this action for a declaratory judgment that it was not liable for the overcharge, and the United States counterclaimed for the amount of the overcharge. The district court rendered judgment for petitioner on the ground that the ICA regulation and the clause in the certificate required parity only among the rates of all government-financed shipments and did not contemplate that rates for government-financed shipments would be measured against purely commercial rates (Pet. App. 10a–49a). The court relied, for this conclusion, on the Cargo Preference Act, 46 U.S.C. 1241(b), which it construed as prescribing an independent "fair and reasonable" standard for rates to be charged by American-flag vessels for government-financed shipments (Pet. App. 18a–34a). The court of appeals reversed, holding that the contract terms created an "express warranty" that the rates charged on the government shipments were no higher than those paid by commercial customers (Pet. App. 3a–6a) and that the Cargo Preference Act did not prevent carriers from being bound by such an agreement (Pet. App. 7a–9a).

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[1] Petitioner actually carried commercial shipments on some of the same vessels transporting the ICA shipments, so that the commercial rates are determinable by reference to the terms of those shipments.

The decision of the court of appeals was correct and does not conflict with any decision of this Court or of any other federal court. There is no warrant for reading the words "similarly situated" in the regulation and the certificate as limited to government-financed shipments. The clauses plainly meant that petitioner undertook not to charge the United States government more than it would charge other customers—private or public—for similar service between similar ports. Nor does the Cargo Preference Act, which directs agencies of the government to make 50 percent of their overseas shipments on American-flag vessels "to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels * * *," disable the government from negotiating a contract with an American shipper whereby it is assured that rates on government-financed shipments will be no higher than rates on commercial shipments. The fact that Congress and executive departments anticipated that the Cargo Preference Act would result in generally higher shipping costs than if the government were free to employ foreign-flag ships (Pet. 8–19) plainly does not establish that American-flag ships were accorded an unconditional license to charge higher rates for government-financed shipments than for private shipments.

In any event, the question presented here is of no continuing importance.[2] Consequently, we respect-

[2] We are advised by the General Accounting Office that only two steamship companies have been found to have charged the government higher rates than private customers in similar circumstances under certificates such as those involved here. The

fully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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dispute with the other company has been settled. Hence the only effect of this litigation appears to be as to petitioner's past rates.

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